

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EXPLORICA, INC.

Plaintiffs,

v.

ELDERHOSTEL, INC.
d/b/a EXPLORITAS,

Defendants.

Civil Action No. 09-11719-RGS

**ELDERHOSTEL'S MOTION TO DISMISS
COUNT III OF EXPLORICA'S COMPLAINT**

Defendant Elderhostel, Inc. ("Elderhostel") hereby moves under Fed. R. Civ. P. 12(b)(6) to dismiss Count III of the Complaint.

Plaintiff Explorica, Inc. ("Explorica") alleges in Count III of its Complaint (D.I. 1) that the use of the EXPLORITAS mark by Elderhostel is likely to cause dilution of Explorica's mark under 15 U.S.C. § 1125(c). Explorica's Complaint admits that the alleged "fame" of its mark is limited to a small market. The law is clear that such "niche fame" is insufficient to state a claim for dilution. Explorica's Complaint thus fails to state a claim for relief for trademark dilution under 15 U.S.C. § 1125(c).

In support of this Motion, Elderhostel submits the accompanying Memorandum of Law in Support of its Motion to Dismiss Count III of Explorica's Complaint.

WHEREFORE, Elderhostel respectfully requests that this Court grant Elderhostel's Motion to dismiss Count III of Explorica's Complaint.

Respectfully submitted,

ELDERHOSTEL, INC.
d/b/a EXPLORITAS,

By its attorneys,

Dated: November 12, 2009

/s/ Michael A. Albert
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LOCAL RULE 7.1(A)(2) AND CERTIFICATE OF SERVICE

I certify pursuant to Local Rule 7.1(a)(2) that counsel for Elderhostel conferred in good faith with opposing counsel on November 12, 2009 concerning the matter set forth herein and the parties were unable to reach an agreement.

I certify that this document is being filed through the Court's electronic filing system, which serves counsel for other parties who are registered participants as identified on the Notice of Electronic Filing (NEF). Any counsel for other parties who are not registered participants are being served by first class mail on the date of electronic filing.

/s/ Michael A. Albert